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MAY 06 2008

OFFICE OF PETITIONS

In re Application of Hataker :
Application No. 09/751,409 :
Filing Date: December 28, 2000 :
Attorney Docket No. 10559/358001/P10035 :

Decision on Petition

This is a decision on the petition under 37 CFR 1.137(a), filed May 24, 2007, to revive the above-identified application.

The petition is **DISMISSED**.

Facts:

The application papers filed on December 28, 2000, stated all correspondence should be mailed to:

SCOTT C. HARRIS
Fish & Richardson P.C.
4350 La Jolla Village Drive, Suite 500
San Diego, CA 92122

The Office mailed a non-final Office action on June 7, 2004, to the address of record.

Petitioner filed a reply to the non-final Office action on September 10, 2004. The reply did not request the Office change the address of record.

The Office mailed a final Office action on February 16, 2005. The final Office action set a shortened statutory period for reply of three (3) months.

The USPS returned the final Office action to the Office undelivered on February 16, 2005. A USPS stamp on the returned envelope indicates the Office action could not be delivered as addressed.

Since an extension of time under the provisions of 37 CFR 1.136(a) was not obtained, and a reply was not filed, the application became abandoned on May 17, 2005.

An interview summary in the file wrapper indicates the examiner spoke with Scott Harris on the telephone on August 22, 2005. Specifically, the interview summary states, "On above date I spoke with the above mentioned attorney confirming the abandonment of the case."

A Change of Address was filed August 26, 2005. As a result, the address on record was changed to the address associated with Customer No. 20985.

A Notice of Abandonment and copy of the August 22, 2005 Interview Summary were mailed September 21, 2005.

The instant petition was filed May 24, 2007.

Discussion:

The failure to receive the final Office action:

Petitioner states the delay in filing a reply was unavoidable based on a failure to receive the final Office action because the Office mailed the address to an incorrect address. However, the reason the Office action not received by petitioner was petitioner's failure to notify the Office of a new address. MPEP 601.03 states in part,

Where an attorney or agent of record (or applicant, if he or she is prosecuting the application pro se) changes his or her correspondence address, he or she is responsible for promptly notifying the . . . Office of the new correspondence address.

A delay caused by the failure on the part of petitioner, or petitioner's representative, to provide the Patent and Trademark Office with a current correspondence address does not constitute an unavoidable delay.

MPEP 711.03(c)(III)(C)(2) states,

where an application becomes abandoned as a consequence of a change of correspondence address (the Office action being mailed to the old, uncorrected address and failing to reach the applicant in sufficient time to permit a timely reply) an adequate showing of 'unavoidable' delay will require a showing that due care was taken to adhere to the requirement for prompt notification in each concerned application of the change of address.

The delay in filing the petition under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable.

The record indicates Attorney Harris was informed of the application was abandoned during a telephone conversation between the examiner and Attorney Harris on August 22, 2005.

The record indicates a Notice of Abandonment was mailed September 21, 2005.

The petition was not filed until May 24, 2007.

Petitioner has failed to provide any explanation for the delay in filing the petition. Therefore, petitioner has failed to prove the entire delay in filing a grantable petition was unavoidable.

Petitioner's current options:

Petitioner may file a request for reconsideration within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)."

If petitioner cannot provide the evidence necessary to establish unavoidable delay, or simply does not wish to, petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by the required reply (already submitted), the required petition fee (\$1,540 for a small entity), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.

If a petition under 37 CFR 1.137(b) is filed, in addition to the requirements above, petitioner should supply an explanation for the delay in filing a petition to revive. The explanation does not need to be sufficient to prove unavoidable delay. The explanation merely needs to demonstrate the delay in filing the petition was not intentional.

A copy of a PDF "fillable" version of a form one may use when filing a petition under 37 CFR 1.137(b) can be found at: http://www.uspto.gov/web/forms/sb0064_fill.pdf.

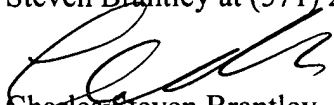
Any future correspondence with respect to this matter, unless filed by EFS, should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
 Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.

A handwritten signature in black ink, appearing to read 'Charles Brantley', is written over the printed name.

Charles Steven Brantley
Senior Petitions Attorney
Office of Petitions